

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**David A. Hansen  
Kathleen Greenlee Hansen**

**Chapter 7**

**Debtor(s).**

**BK 04-31635**

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**NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE**

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**TO:** The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion before the Honorable Gregory F. Kishel at 3:00 p.m. on November 8, 2004, in Courtroom No. 228B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than November 3, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 28, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: \_\_\_\_\_

**CLERK OF BANKRUPTCY COURT**

By: \_\_\_\_\_  
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**David A. Hansen  
Kathleen Greenlee Hansen**

**Chapter 7**

**Debtor(s).**

**BK 04-31635**

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**NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)**

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TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion before the Honorable Gregory F. Kishel at 3:00 p.m. on November 8, 2004, in Courtroom No. 228B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than November 3, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than October 28, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

3. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this

motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on March 18, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed. On September 21, 2004, the Bankruptcy Court entered an Order extending the time to file a motion to dismiss pursuant to 11 U.S.C. § 707(b) until September 30, 2004. The Court expressly noted that no further extensions would be granted.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors have listed the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors have listed three claims totaling \$ 220,659.00 secured by , a first and second mortgage on the homestead and a 1999 Chrysler Caravan.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors have listed no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors have listed thirteen claims totaling \$ 89,887.00.

8. The debts listed in the debtors Schedule of Liabilities appear to be primarily consumer debt. *See* Debtor's Schedule F. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtors list a monthly net income of \$ 5,747.00. The debtors are

married and have listed two dependents, however, one of those dependents is a 20 year old adult. On May 18, 2004, the United States Trustee wrote to the debtors for additional financial information. *See* Att. Ex. 1. The debtors timely responded on June 8, 2004. *See* Att. Ex. 2 (without attachments).

Based on the pay stub of Kathleen G. Hansen, <sup>1/</sup> for pay period ending May 31, 2004, she has the following net income:

YTD Gross	\$ 42,916.65
Less YTD	
Fed.	(6,462.45)
Soc. Sec.	(2,629.83)
Medicare	(615.04)
MN State	(2,413.05)
Medical	(500)
Staff Gift	(10)
United Way	(25)
General Fund	(1000)

YTD Net Income \$ 29,261.28 divided by 5 = \$ 5,852.26 average net income<sup>2/</sup>.

It appears that Ms. Hansen over withholds income taxes by approximately \$ 175.00. This figure is based on 2003 income taxes of \$ 18,182 owed on gross income of \$ 138,487 or 13% federal tax rate. The 13% rate applied to the gross figure above, would provide withholding of \$ 5,579.16, for a difference of \$ 888.29. In 2003, state taxes were approximately 4.8% of gross income, which provides a difference of \$ 353.05 with the figure above, or \$ 70 per month.

Adjusted income of Ms. Hansen is \$ 6,097.26. This amount less pay roll reductions for which there is no YTD information (life insurance and Budget reductions (\$ 105)), provides monthly

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<sup>1/</sup> For security, the pay stubs and tax returns are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee and may submit the pay stubs at any hearing.

<sup>2/</sup> There may be other pay roll reductions that are voluntary, e.g. general fund, which the United States Trustee reserves the right to raise at any evidentiary hearing.

disposable income of \$ 5,992.26.

Mr. Hansen is listed on Schedule I as unemployed. In 2003, the couple grossed \$ 137,833.13. In 2002, gross income totaled \$ 125,545.

10. On Schedule J, the debtors list monthly expenses of \$ 5,876.34. College tuition totaling \$ 697.00 is not reasonable or necessary for the support of the debtors.<sup>3/</sup> *In re Mathes*, 1996 WL 1055813 (Bankr. D. Minn. Aug. 21, 1996) (Kishel, J.), *aff'd*, July 2, 1997 (D. Minn. 1997) (holding that educational expenses are subject to scrutiny for § 707(b) purposes)(citing *In re Jones*, 55 B.R. 472, 467 (Bankr. D. Minn. 1985) (§ 1325 analysis); *In re Gyurci*, 95 B.R. 639, 643 (Bankr. D. Minn. 1989) (§ 707(b) analysis)). Courts generally hold that educational expenses for dependants is reasonable, but expenses for non-dependants or the debtor, especially higher levels of education, is not permissible. See *In re Gonzales*, 157 B.R. 604, 609 (Bankr. E.D. Mich. 1993); *In re Riegodedios*, 146 B.R. 691, 692 (Bankr. E.D. Va. 1992).

Adjusted expenses total \$ 5,179.34.

11. Average net monthly income of \$ 5,992.26 less monthly expenses of \$ 5,179.34 provides the debtors with a monthly disposable income of \$ 812.92.

12. Monthly disposable income of \$ 812.92 would enable the debtors to pay approximately \$ 29,265.98 or 43% of the unsecured creditors (less student loan payments, which are included on Schedule J) in a hypothetical thirty six month Chapter 13 plan. The debtors can pay approximately 73% in a hypothetical sixty month Chapter 13 plan.

13. The spouse is currently employed, and there does not appear to be any likelihood that

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<sup>3/</sup> There may be other expenses which are unreasonable or excessive for the support of the debtors that the United States Trustee may raise at an evidentiary hearing, but are not necessary for the purpose of this motion.

her employment will be terminated at any time in the future.

14. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

15. As an alternative to dismissal, the U.S. Trustee has been informed that the Chapter 7 Trustee and debtors have settled litigation over a potential asset for \$ 26,000, which would provide a comparable distribution up front in the Chapter 7 case (based on proof of claims filed) to the hypothetical Chapter 13 payments over thirty-six months. Upon information and belief, the funds are due to be paid on or before October 4, 2004. The U.S. Trustee has agreed that if the funds are paid and the settlement approved by the Bankruptcy Court, he will withdraw this motion.

16. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: September 30, 2004

Respectfully submitted,

HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
IA ATTY No. 14014  
(612) 664-5500

# Exhibit 1



**U. S. Department of Justice**

Office of the United States Trustee

*Districts of Minnesota, North Dakota,  
South Dakota and Iowa*

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U.S. Courthouse, Suite 1015

612 / 664-5500

300 South Fourth Street

FAX 612 / 664-5516

Minneapolis, MN 55415

May 18, 2004

Craig W. Andresen  
2001 Killebrew Drive, Suite 330  
Bloomington, MN 55425

Re: *David A. Hansen and Kathleen Greenlee Hansen*, Bankr. No. 04-31635

Dear Mr. Andresen:

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation of this case. Please provide **copies** of the following information on or before June 11, 2004.

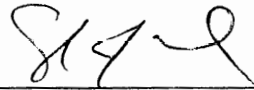
1. Copies of last three pay stubs for both debtors.
2. Copies of the 2002 and 2003 state and federal tax returns, including attachments (W-2s).
3. Provide any documentation showing that any reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).
4. Copies of check stubs or receipts for last three months of college tuition bill.
5. Explain past education of Mr. Hansen; what his future study will be; and how long he is expected to attend school.



Please call if you have a question or concern about this letter.

Sincerely,

HABBO G. FOKKENA  
UNITED STATES TRUSTEE

A handwritten signature in black ink, appearing to read 'S. J. Wencil', written over a horizontal line.

Sarah J. Wencil  
Trial Attorney

cc: David A. Hansen and Kathleen Greenlee Hansen  
Patti J. Sullivan, Chapter 7 Trustee

# Exhibit 2

May 27, 2004

Craig W. Andresen  
2001 Killebrew Drive, Suite 330  
Bloomington, MN 55425

Dear Craig,

I've enclosed copies of the information requested by Mr. Fokkena in his letter of May 18, 2004. Please use this however you think best.

More specifically, I've enclosed:

1. Copies of the **last three pay stubs** for Kathy and me;
2. Copies of our **tax returns** (federal and state, with W2s) for 2002 and 2003;
3. Regarding Documentation on **Mandatory/Voluntary Retirement Deductions**  
As you can see from her pay stubs and her W2s, there is no deduction of any kind from Kathy's pay for retirement (her employer contributes everything); I, of course, am unemployed and have no retirement plan payments, voluntary or mandatory.
4. Copies of two check stubs and a receipt for the **past three tuition payments** to St. Olaf College.  
The checks are from November and December of 2003, for \$1900 each. In January, when I lost my job, Abby dropped out for spring semester to earn money for her return in the fall of 2004 (for which she is already registered).  
The \$800 receipt is the down payment for the fall term.  
We presently owe \$2489.54 from last year, due on June 24, 2004.
5. Regarding my **past education/plans**:  
I graduated with a BA from St. Olaf College in 1979. I graduated with a Master of Divinity degree from McCormick Theological Seminary in 1983. The Master of Divinity degree qualified me for ordained ministry in the Presbyterian Church (USA). I lost my ordination status in August of 2000, and can no longer work in professional ministry.  
I am considering going to law school, though I've not yet applied, or even taken the LSAT. The earliest date I could start at the University of Minnesota would be the fall of 2005. Whatever degree I pursue will require at least three, possibly four years after that.

Thanks for your help on this matter.

Sincerely,

  
David A. Hansen

## **VERIFICATION**

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: September 30, 2004

Signed: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

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Kathleen Greenlee Hansen**

**Chapter 7**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

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The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

**Analysis**

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

### **(1) The Debtor's Debts Are Primarily Consumer Debts.**

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtors checked on the Petition that the nature of the debts are consumer/non-business.

### **(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.**

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974

F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

*Walton*, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

*Mathes v. Stuart (In re Mathes)*, Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)

*See also In re Shirley Wilkins*, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.) (holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtors have the ability to pay approximately \$ 29,265.98 or 43% of the unsecured creditors (less student loan payments, which are included on Schedule J) in a hypothetical thirty six month Chapter 13 plan. The debtors have the ability to pay approximately 73% of the general unsecured creditors in a hypothetical sixty month hypothetical Chapter 13 plan. The



ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: September 30, 2004

Respectfully submitted,

HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
IA ATTY No. 14014  
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT  
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**Chapter 7**

**Debtor(s).**

**BK 04-31635**

---

**CERTIFICATE OF MAILING**

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The undersigned certifies under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.


That on September 30, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

**Addressee(s):**

Craig W. Andresen  
2001 Killebrew Dr. Suite 330  
Bloomington, MN 55425

Patti Sullivan  
P.O. Box 16406  
St. Paul, MN 55116

David and Kathleen Hansen  
635 Evergreen Court  
Stillwater, MN 5508

  
\_\_\_\_\_  
Office of the United States Trustee  
Terri Frazer

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**David A. Hansen  
Kathleen Greenlee Hansen**

**Chapter 7**

**Debtor(s).**

**BK 04-31635**

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**ORDER**

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At St. Paul, Minnesota, this \_\_\_\_\_ day of \_\_\_\_\_, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

**IT IS HEREBY ORDERED:**

That the Chapter 7 bankruptcy case filed by the above-captioned debtors is dismissed pursuant to 11 U.S.C. Section 707(b).

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The Honorable Gregory F. Kishel  
United States Bankruptcy Judge